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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JESSE RICHARD LONG, Defendant and Appellant.	C087108 (Super. Ct. No. 17FE023643)

A jury found defendant Jesse Richard Long guilty of making criminal threats against Amy J. during an altercation arising from defendant asserting Amy stole his bicycle. Defendant appeals and contends: (1) defense counsel was ineffective for failing to object to gang-related testimony and failing to request a gang evidence limiting instruction; (2) the prosecutor committed error in closing argument for commenting on defendant's courtroom demeanor and behavior; (3) the trial court abused its discretion in

denying his motion to reduce the conviction to a misdemeanor under Penal Code[1] section 17, subdivision (b); (4) the trial court abused its discretion by denying his request to strike a 1998 conviction under section 1385; and (5) the matter should be remanded to the trial court to consider exercising its discretion to strike his five-year enhancement under section 667, subdivision (a). The People agree remand is appropriate as to the five-year enhancement and we agree as well. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with robbery in the second degree, assault with a deadly weapon, and making criminal threats. A jury found defendant guilty of the criminal threats charge and not guilty of the robbery and assault with a deadly weapon charges. He was sentenced to nine years in state prison.

I

Prosecution's Case

Amy J. testified she was talking to two teenaged males when defendant walked up and tried to take one of her two bicycles from her. He claimed the bicycles were his. Defendant was aggressive, "[s]natching and pulling and yelling and calling [her names]." Amy felt like she was in danger.

Amy and defendant each held on to one of the bicycles, doing a tug of war. Defendant called her "bitches and 'hos" and said "you need to be on the track, you don't know who you are fucking with, [I am] Del Paso Heights 'Zilla" and he was "going to beat [her] ass." Amy understood the "Del Paso Heights 'Zilla" comment to mean defendant was a gang lord. When asked whether she took the comment as a threat, Amy said she did and was intimidated by it.

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1 All further section references are to the Penal Code unless otherwise specified.

According to Amy, defendant pushed her in the chest with one hand and pulled a red box cutter from his pants with the other. He extended the blade and waived it at her. Amy told him to stop and asked others to call the police. Defendant let go of the bicycle, kicked her other bicycle on the ground, and said "I'm going to bust your head to the white meat." Although Amy did not know what "busting your head into white meat" meant,[2] she "felt really scared" and thought defendant was going to hurt her. She did not, however, show him that she was scared because she was taught not to show fear. Defendant got more aggressive and "kept saying 'Uz.' "

A woman in a vehicle yelled at defendant to stop and said she had called the police and they were on the way. Defendant responded he "d[id]n't give a fuck" and kept tugging for the bicycles and making threats. When the police arrived, however, defendant walked away.

Two witnesses observed the altercation. One testified she saw a man grabbing a bicycle from someone, likely a woman, and heard multiple people yelling. She also saw a different person waving something like a scooter around. The witness called 911[3] out of fear the woman was going to get hurt "[b]ecause there were a few men standing around there [who] could [have] harm[ed] her."

The second witness testified she saw defendant and a woman with their hands on the same bicycle and it looked like he was trying to take it away from her. They were yelling at each other and the woman said something to the effect of "[n]o, you can't take this" or "[n]o, you're not going to take this." Defendant was aggressive toward the woman; the woman looked scared and her body language was defensive. The woman

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[2] During Amy's cross-examination, defendant introduced a video clip into evidence of Amy asking an officer what "bust your head into the white meat" meant. The officer responded he did not know.

[3] A recording of the 911 call was played for the jury.

held something like a scooter in her hand and waived it in a forward motion "as a way to sort of push him away." The witness recorded the incident on her phone and called 911 -- she thought the woman was going to get beat up or killed.[4] She honked her horn and yelled that she had called the police but, although defendant appeared to relax, he did not release his grip on the bicycle. The woman was ultimately able to leave with her bicycle.

Two police officers testified. Sacramento Police Officer Daniel Mejorado found a red box cutter on defendant when he searched him. Sacramento Police Officer Robert Lindner testified regarding his interview of another witness. The witness told Officer Lindner that a woman with two bicycles came up to him and his friend when another man started accusing her of taking his bicycle. The man tried to grab the bicycles from the woman and a struggle ensued. The man and woman argued back and forth; the man held a blade like a box cutter in his hand but he was not threatening the woman with it.

II

Defense's Case

Defendant testified on his own behalf. He said his bicycle was across the street when he fell asleep and in the morning his bicycle was gone. Amy had his bicycle, told him she took it, and launched racial slurs at him. He said one of the two bicycles Amy had with her was his; he saw her with it. Although not directly testified to, defendant intimated that he and Amy were struggling over his bicycle that day.

Defendant said Amy told him she was the orchestrator of a bicycle theft ring and was "talking real greasy to [him], like a real street-like gang-related individual." He never got physical with her, pushed her, or swung a box cutter at her. He walked away and told her to keep the bicycle because he did not want any trouble.

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[4] The phone video and 911 recording were played for the jury.

When asked whether Amy "ha[d] anything on her besides standing next to the bikes," defendant said she had a bicycle pump with her and swung it at him, hitting him about four to five times on the arm, and telling him she was "going to bust [his] head to the white meat." Defendant said the statement was common street slang for "[y]ou bust somebody's head open and they got a layer of white meat under there."

During cross-examination, defendant said his trial testimony was consistent with the statement he gave to police. He denied making a statement to police that he told Amy he was going to keep her bicycle until she returned his bicycle to him; he confirmed he was holding on to his bicycle that day and said he was not trying to take hers. Although not mentioned during his direct testimony, defendant testified during cross-examination that Amy had a knife during the altercation and swung it at him.

On redirect, defendant said he asked the police officer to search Amy for the knife, but the officer just made fun of him. Defendant also testified he asked the officer to talk to his uncle across the street, but the officer did not agree to do so.

III

Prosecution's Rebuttal

The prosecution called Officer Mejorado as a rebuttal witness. Officer Mejorado had taken defendant's statement at the scene of the incident and his body camera recorded the interview. A video of the interview was played for the jury, and the officer confirmed the video was an accurate depiction of the statement given. In the interview, defendant first said Amy took his bicycle, then he said she told him a white male took his bicycle, and he also said Amy put his bicycle in a car. Further, he said he grabbed Amy's bicycle to take it "hostage" to secure return of his bicycle; he did not know where his bicycle was. When he told Amy that he was not going to give the bicycle back until she returned his, Amy swung a pocket knife and bicycle pump at him. She hit him in the arm with the pump three or four times and said she was going to bust his head open. The

video did not show defendant requesting that the police search Amy or talk to his uncle across the street.

Officer Mejorado confirmed the bicycle Amy had with her on the day of the incident did not match the description of the bicycle defendant claimed was stolen.

DISCUSSION

I

There Was No Ineffective Assistance Of Counsel

Defendant contends his counsel was ineffective "by failing to request a gang evidence limiting instruction and by failing to object to the prosecution's questions and [Amy's] testimony that [defendant] was a gang lord in a specific gang" because the evidence was highly prejudicial and inadmissible under Evidence Code section 352. The People disagree, arguing the prosecution's questions and Amy's testimony in that regard were "relevant to establish that [Amy] was placed in reasonable, sustained fear" and admissible to fortify Amy's testimony and credibility. We conclude defense counsel was not ineffective.

The exchange between the prosecutor and Amy, of which defendant complains, reads as follows:

"Q[uestion] What exactly was he saying to you? What were the words used? You said he was calling you out your name.

"A[nswer] He was calling me bitches and 'hos, you need to be on the track, you don't know who you are fucking with, he's Del Paso Heights 'Zilla.

"Q[uestion] When he said he was Del Paso Heights 'Zilla, what did that mean to you?

"A[nswer] A gang lord.

"Q[uestion] Did you take that as a threat?

"A[nswer] Yes.

"Q[uestion] And did you feel intimidated by that?

"A[nswer] Yes.

"Q[uestion] What else?

"A[nswer] That if I didn't let go of the bike that he was going to beat my ass, so I told him, you put your hands on me, you're going to go to jail, several times, over and over, and he still became more aggressive, so that's when I snatched my bike back, and I was yelling, call the police, and the two guys were just sitting there. They were just, like, stuck."

During the prosecutor's discussion of the criminal threats charge in closing argument, she said: "First, the defendant willfully threatened to unlawfully cause great bodily injury to Amy. . . . And what evidence do we have of that? Well, he told her she was -- he was going to bust her head if she did not give him her bike. He said 'Uz,' which Amy stated is gang-related things, and he said, 'I'm going to bust your head into the white meat.' "

To establish ineffective assistance of counsel, a defendant must prove that: (1) counsel's performance fell below the prevailing professional norms; and (2) that it is reasonably probable a more favorable outcome would have resulted but for counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693]; *People v. Williams* (1997) 16 Cal.4th 153, 257.) "[I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Courts "accord great deference to the tactical decisions of trial counsel in order to avoid 'second-guessing counsel's tactics and chilling vigorous advocacy . . . .' " (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under

the circumstances, the challenged action 'might be considered sound trial strategy.' " (*Strickland*, at p. 689 [80 L.Ed.2d at pp. 694-695].)

Defendant contends there can be no satisfactory explanation for why counsel failed to request a gang evidence limiting instruction and did not object to the preceding questions and answers. We disagree.

On the issue of the admissibility of Amy's testimony, we note, in general, evidence is admissible if it is relevant and its probative value is not substantially outweighed by the probability that it will unduly consume time, "create substantial danger of undue prejudice," confuse the issues, or mislead the jury. (Evid. Code, §§ 210, 352.) Gang evidence is inflammatory in nature and tends to allow the jury to improperly infer that the defendant is criminally disposed and culpable of the charged offense. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) As a result, "[i]n cases *not* involving [a] gang enhancement, [our Supreme Court has] held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

"Nonetheless, evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1167.) "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049.)

Defendant appears to concede that Amy's challenged testimony was relevant to the criminal threats charge and does not argue otherwise. Defendant instead argues the testimony was inadmissible because it was cumulative and more prejudicial than probative.[5]

We agree the testimony was relevant to the criminal threats charge as to the specific intent and sustained fear elements of the offense. (See § 422.) Statements made to heighten the seriousness of a threat are germane to the speaker's intent that the threat be taken as such and the universal reputation of gangs for violence and retaliation may support the sustained fear element as well. We disagree, however, that the evidence was cumulative and more prejudicial than probative.

Defendant believes the testimony was cumulative to the threat and fear elements because Amy also testified defendant "threatened to 'bust her head to the white meat' and that he said he would 'beat her ass' if she didn't let go of the bike." Those statements were pertinent to the threat elements of the offense to show "the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person' " and the threat was " 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.' " (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) As we explained, the testimony at issue was relevant to the specific intent and sustained fear elements of the offense. We fail to see how the gang comment testimony was cumulative to the testimony relaying the specific threats made.

In arguing the evidence was more prejudicial than probative, defendant relies on *Avitia*. (*People v. Avitia* (2005) 127 Cal.App.4th 185.) He argues the evidence was "just like the gang evidence admitted in [that case]." Defendant is mistaken.

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5 The People's entire argument relates to the relevancy of the evidence; the People do not address defendant's cumulative and more prejudicial than probative arguments.

In *Avitia*, the defendant was found guilty of discharging a firearm in a grossly negligent manner, possession of an assault weapon, and possession of a firearm by a misdemeanant. (*People v. Avitia, supra,* 127 Cal.App.4th at p. 191.) The appellate court reversed the defendant's conviction for grossly negligent discharge of a firearm because the trial court erred in admitting evidence of gang graffiti in the defendant's bedroom. (*Id*. at pp. 185, 193, 196.) The charged offenses in *Avitia* were not gang related and there was no evidentiary link between the gang graffiti and ownership of the guns found in the bedroom. (*Id.* at pp. 185, 193.) The appellate court further observed that, even if the gang evidence was somehow relevant to proving that the defendant owned the guns, that issue was undisputed, rendering the gang graffiti evidence devoid of probative value and cumulative at best. (*Id.* at pp. 193-194.) Thus, "the only possible function of the gang evidence was to show [the defendant's] criminal disposition." (*Id.* at p. 194.) We see no similarity between the evidence at issue in *Avitia* and the testimony challenged here.

We acknowledge the inherent prejudice gang evidence presents but conclude the testimony regarding defendant's gang statement did not outweigh the probative value in this case. The testimony was brief and confined to elicit evidence in support of the offense charged. The questioning sought to elicit *Amy's* understanding of what defendant meant by the comment to support her perceived fear; there was no evidence introduced via expert testimony or otherwise supporting Amy's interpretation of the comment. Accordingly, because the evidence was properly admitted, defense counsel was not ineffective for failing to object to it.

Turning to defendant's argument that defense counsel was ineffective for failing to request a limiting instruction, we note there may have been a tactical reason for not requesting the instruction -- that is to avoid the risk that by highlighting such evidence, the jury might focus on it. (See *People v. Maury* (2003) 30 Cal.4th 342, 349 ["A reasonable attorney may have tactically concluded that the risk of a limiting instruction

(suggesting to the jury that the evidence supporting the . . . murders was relatively strong) outweighed the questionable benefits such instruction would provide"].) The prosecution's singular, very brief mention of Amy's gang-related testimony during closing argument does not render such a tactical decision unreasonable, as defendant claims. Accordingly, we conclude counsel was not ineffective for failing to request a limiting instruction.

II

Any Prosecutorial Error Was Harmless

Defendant contends the prosecutor committed error during closing argument by: (1) stating the jurors "could find [defendant] guilty based upon his behavior at trial, specifically including his courtroom behavior, when he was not on the stand testifying, including his body language and his behavior in making comments during trial"; and (2) misstating the law by stating the jurors could consider a witness's behavior in the courtroom "to determine the credibility of a witness under the jury instruction that informs the jury as to what [it] may consider to decide whether a witness is credible, and comments made by, and the behavior displayed by, a witness sitting in a courtroom before and after [his or her] testimony, is not evidence a jury may use to determine that witness is not credible."

The People argue defendant forfeited the argument because his counsel failed to object to the prosecutor's statement; in the alternative, the People argue the prosecutor appropriately commented on defendant's behavior because he elected to testify at trial, thereby placing his credibility in issue, and the argument was proper under Evidence Code section 780, subdivision (j), and CALCRIM No. 226. Even if the prosecutor's comments were error, however, the People argue the error was harmless. Defendant responds that the "error was not forfeited by defense counsel's failure to object to the prosecutor's improper comments during closing because defense counsel was ineffective in failing to object."

In the disputed portion of the prosecutor's closing argument, the prosecutor discussed how to evaluate the credibility of the witnesses and said, among other things: "And his attitude about the case, including during the course of trial, sitting in the courtroom and making comments throughout the whole trial, you can take that into consideration. [¶] Body language throughout the whole trial, you can take that into consideration. Reaction when confronted and body-worn camera was played, you can take that into consideration to decide whether someone remembers their original stories or not or whether it was all a surprise for their memory."

Defense counsel responded to this statement in his closing argument, stating the prosecutor "mentioned [defendant]'s behavior in court, that you can take that into account and that is supposed to say that he is guilty or something. There are 14 people in this room who never met [defendant], and he is being accused of some very serious crimes. He pled not guilty. He told you on the stand he didn't do the crimes that the district attorney wants you to believe he did. What would you do in a situation like that?"

In rebuttal, the prosecutor said, in part: "And it's funny that the defense talked about how this is such a serious crime and it's a very serious offense. And it is. I agree. Then why was the defendant laughing throughout the course of this trial? What was so funny to him about all this?"

As a preliminary matter, we disagree with defendant's characterization of the prosecutor's comments as statements that "told the jurors that they could find [defendant] guilty based upon his behavior at trial, specifically including his courtroom behavior, when he was not on the stand testifying, including his body language and his behavior in making comments during trial." The prosecutor's demeanor comments during closing argument clearly pertained only to the issue of defendant's *credibility* as a witness and, although the laughter comment during rebuttal was not expressly couched in the same way, we do not read the statements to indicate to the jury that it could find defendant guilty based on his courtroom demeanor and behavior.

Turning to the propriety of the comments, we note, generally, "[i]n criminal trials of guilt, prosecutorial references to a *nontestifying* defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (*People v. Heishman* (1988) 45 Cal.3d 147, 197, italics added.) "Comment on a defendant's demeanor as a witness[, however,] is clearly proper and comment on courtroom demeanor may be proper under some circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030, citing *Heishman*, at p. 147 and *People v. Thornton* (1974) 11 Cal.3d 738, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

Circumstances in which comments on courtroom demeanor by a testifying defendant were found proper include where a prosecutor "urg[ed] the jury not to be misled by defendant's modest demeanor in the courtroom, [and] compare[d] that demeanor with the quality of the acts which, according to prosecution evidence, he had performed" (*People v. Thornton*, *supra*, 11 Cal.3d at pp. 762), and where a prosecutor called attention to a defendant's facial expressions during the victims' testimony "at a *penalty* trial in which defendant had placed his own character in issue as a mitigating factor" (*People v. Heishman*, *supra*, 45 Cal.3d at p. 197, italics added; accord, *People v. Beardslee* (1991) 53 Cal.3d 68, 114). The People believe *Thornton* and *Heishman* support the conclusion that the demeanor comments were proper because defendant placed his credibility in issue by testifying. But, the facts in those cases render the cases distinguishable -- the prosecutor's comments here did not seek to "point out to the jury that modest behavior at one time and place, i.e., in the courtroom, [was inconsistent] with depraved conduct under other circumstances" (*Thornton*, at p. 763) and the comments did not arise in a penalty trial (*Heishman*, at p. 197).

The People also cite to our Supreme Court's broad statement in *Navarette* that "a prosecutor may comment during closing argument on a defendant's demeanor." (*People v. Navarette* (2003) 30 Cal.4th 458, 516.) That statement must be read in context with the nature of the proceeding at issue, which was a *penalty* trial. We are aware of several cases in which our Supreme Court has found comments on a defendant's behavior proper during the penalty phase of trial. (See, e.g., *People v. Valencia* (2008) 43 Cal.4th 268, 307 ["the prosecutor may comment on the defendant's demeanor when the defendant has testified or placed his character into evidence"]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1023; *People v. Beardslee*, *supra*, 53 Cal.3d at p. 114; *People v. Wharton* (1991) 53 Cal.3d 522, 596; *People v. Jackson* (1989) 49 Cal.3d 1170, 1206 ["Comments on defendant's off-the-stand courtroom demeanor may not be improper during the penalty phase, for the jury may, in appropriate circumstances, consider a defendant's courtroom behavior and demeanor in its sentencing determination"]; *People v. Haskett* (1990) 52 Cal.3d 210, 247.) Those cases do not, however, inform our consideration of the issue under the facts of this case, during a guilt trial.

We have found no California case addressing whether a prosecutor may comment on a testifying defendant's off-the-stand courtroom demeanor and behavior during a guilt trial as an aspect of his credibility nor have the parties identified any.

Defendant relies on *Garcia*, in which the court held that, "[o]rdinarily, a defendant's nontestimonial conduct in the courtroom does not fall within the definition of 'relevant evidence' as that which 'tends logically, naturally, [or] by reasonable inference to prove or disprove a material issue' at trial." (*People v. Garcia* (1984) 160 Cal.App.3d 82, 91.) That "holding [wa]s[, however,] limited to those instances where defendant's nontestimonial behavior at counsel table is not objectively relevant to any disputed issue at trial and is merely offered to show defendant's character or a trait of his character." (*Id.* at p. 91, fn. 7.) Importantly, the defendant in *Garcia* elected not to testify at trial and

did not, therefore, place his credibility in issue. (*Id*. at p. 92, fn. 9.) For this reason, *Garcia* does not assist in our analysis of the comments in this case.

Although the issue presented appears to be somewhat novel in California, we need not address the initial question of error because, even if we assume error, there was no possibility defendant suffered prejudice. Defendant argues that, "[b]ecause the prosecution's comments during closing argument amounted to a Federal Due Process error, the error should be reviewed to determine whether it was harmless under the standard set forth in *Chapman* . . . , which requires that the error be found to be harmless beyond a reasonable doubt in order to avoid reversal of the judgment." (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].) The People argue the appropriate standard is whether "a result more favorable to the defendant would have been reached without the misconduct." (Citing *People v. Crew* (2003) 31 Cal.4th 822.) We find no prejudice under either standard.

Defendant chose to testify, thereby reducing any harm to his Fifth Amendment rights. The prosecutor's comments regarding defendant's demeanor on the issue of his credibility were brief and the evidence establishing defendant's lack of credibility was strong. Defendant's account of the altercation, i.e., that Amy was the aggressor, directly conflicted with that of Amy and the noninterested witnesses. Officer Lindner testified a person present during the altercation said defendant was the aggressor and accused Amy of taking his bicycle. The two witnesses who saw the altercation from their vehicles also identified defendant as the aggressor. The jurors were also able to review a recording of the incident for themselves.

Defendant's trial testimony differed significantly from the statement he gave to police on the day of the incident -- including whether Amy was the one who took his bicycle, whether the bicycle they were struggling over was his, and the specific actions and statements relating to the altercation between them. The video recording of Amy's statement to police on the day of the incident also showed that she did not know what the

statement "bust your head into the white meat" meant; whereas, defendant testified that it was common street slang for "[y]ou bust somebody's head open and they got a layer of white meat under there."

Moreover, the prosecutor merely told the jury that it could take defendant's comments, attitude, body language, and reaction to the body camera evidence into account in considering defendant's credibility. The prosecutor did not attempt to color defendant's actions in any specific way -- she left it up to the jury to draw its own inferences from its observations. Also, the prosecutor's laughter comment in her rebuttal argument does not support a finding of prejudice. "[T]he prosecutor's brief comment on defendant's laughter was so minor as to be entirely harmless. The jury was not asked to draw any adverse inferences of guilt from defendant's conduct." (*People v. Medina* (1990) 51 Cal.3d 870, 896.) We thus conclude that to the extent the prosecutor's comments constituted error, the error was harmless.

III

The Trial Court Did Not Abuse Its Discretion By Denying Defendant's Request To Reduce The Conviction To A Misdemeanor

"Penal Code section 17(b) authorizes the reduction of wobbler offenses -- crimes that, in the trial court's discretion, may be sentenced alternatively as felonies or misdemeanors." (*People v. Douglas* (2000) 79 Cal.App.4th 810, 812-813.) The criminal threats offense is one such "wobbler." (See § 422, subd. (a).) The trial court has broad discretion in ruling whether to reduce a felony to a misdemeanor and we review its decision for abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) The factors informing the trial court's decision include " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " (*Id.* at p. 978.) "[A]n appellant who seeks reversal [for abuse of discretion] must demonstrate that the trial court's decision was irrational or arbitrary" (*People v.*

Myers (1999) 69 Cal.App.4th 305, 309-310), exceeding the bounds of reason in light of all of the surrounding circumstances (*People v. Giminez* (1975) 14 Cal.3d 68, 72).

Defendant argues the trial court erred in denying his section 17, subdivision (b) request "for the following reasons: the nature of [defendant]'s offense was non-violent; the circumstances of the offense overwhelmingly weighed in favor of reduction; the particulars of his background, character, and prospects weighed in favor of reduction; and other factors usually taken into account when making similar sentencing decisions were favorable for reduction." The People disagree, arguing the trial court appropriately denied the motion based on the valid consideration of " '[p]reventing the defendant from committing new crimes by isolating him or her for the period of incarceration,' " as provided in California Rules of Court, rule 4.410.

After trial, defense counsel filed the section 17, subdivision (b) motion on the grounds that: the criminal threats charge was not added to the complaint until after the preliminary examination; "[u]p until trial, the offer from the District Attorney's office ha[d] always revolved around a plea to [the robbery charge]"; the jury did not find him guilty on the robbery and assault with a deadly weapon charges; defendant lacked family support and structure as a child; at the time of his arrest, defendant had intentions of going to Houston and living with his sister, and he "was not looking for trouble"; defendant was attacked the week before the incident while homeless; defendant has a low functioning kidney; defendant has held various positions of employment over the years; defendant received "the low term of two years in state prison" for a prior assault with a deadly weapon conviction, and "has never received a sentence greater than 3 years"; and "[a]ctions speak louder than words and given that [defendant] had the opportunity to inflict serious bodily injury on Amy J[.] and didn't, suggests the lack of seriousness regarding the threat."

The probation report listed 13 prior convictions as an adult -- four felonies and nine misdemeanors. One of the felonies was a conviction for assault with a deadly

weapon in 1998, an incident in which defendant stabbed two victims during an argument. The report further notes that, during incarceration, defendant "has [had] documented incidents of negative behavior for insubordination (two), entering another inmate's cell, cursing at a deputy, and failing to lockdown as directed." In support of finding defendant ineligible for probation, the report lists no mitigating circumstances and the following aggravating circumstances: defendant has engaged in violent conduct which indicates a serious danger to society; his prior convictions as an adult are numerous; and he was on postrelease community supervision when he committed the present offense.

In denying defendant's motion to reduce his conviction to a misdemeanor, the judge explained: "There's too much antisocial conduct in his past, right up to this conviction, and it's just not warranted. He has got a[n] [assault with a deadly weapon conviction] with a knife, two victims. It looks like it could have been a homicide, but wasn't. He has another [assault with a deadly weapon conviction], and he has a series of antisocial behavior. He has a misdemeanor [assault with a deadly weapon] and he has a felony [assault with a deadly weapon]. It's right in the probation report. He has prior prison terms and he keeps coming back into the system. He's 40 years old and he should have known better. I'm not taking into consideration whatever the discussions were because I'm not bound by any discussions about what the [district attorney] and the [public defender], what their prior offers were. I am basing it on the evidence that I have and I am basing it on his priors, so I'm not going to reduce it to [a misdemeanor]. I have thought about it. I thought about it. I know I have the discretion to do it, but I'm not going to do it." Defense counsel asked, "[s]o then there is a tax for going to trial essentially?" The judge responded, "no," and explained: "I'm sentencing him to what I think he should get. It's not a misdemeanor. He went to trial. I have listened to the evidence, and I don't think it should be a misdemeanor. I don't believe in penalizing anybody for going to trial. This is not a misdemeanor."

Defendant has not met his burden of showing the trial court's decision was

irrational or arbitrary. The trial court was aware of its discretion and considered defendant's motion and argument and the probation report. The court also observed the testimony and defendant's demeanor at trial, and reflected on defendant's extensive criminal history and the fact that "he keeps coming back into the system." That defendant had the opportunity to inflict serious bodily injury on Amy and did not inflict such injury does not eliminate the public safety considerations for the court. The court is obliged to consider the potential for danger to the public that may result from treating defendant as a misdemeanor offender. The court did so here, noting "[there was] too much antisocial conduct in his past." Given the information before the court and balancing the relevant factors, the court's decision to deny defendant's motion to reduce the attempted criminal threat offense to a misdemeanor was not an abuse of discretion. We do not reweigh the evidence or substitute our judgment for the judgment of the trial judge. (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 978.)

IV

The Trial Court Did Not Abuse Its Discretion By Denying Defendant's Invitation To Strike His Prior Strike Conviction

Immediately following the trial court's denial of his section 17, subdivision (b) motion, defendant orally moved the court to strike his prior assault with a deadly weapon conviction from 1998 under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Defendant did not submit a written motion. The prosecution opposed and said, "[i]f the Court was inclined to grant it, the People would ask for a written motion and notice of such." The judge responded: "You probably should have anticipated it given the 17(b) motion. [¶] I have considered striking the strike under 1385, and I am going to decline to do that. I'm not striking the strike. I'm not going to do it."

Like the denial of defendant's section 17, subdivision (b) motion, we review the court's denial of his section 1385 motion for abuse of discretion. (*People v. Carmony*

(2004) 33 Cal.4th 367, 375.) "In exercising its discretion under section 1385, the court should consider the nature and circumstances of the defendant's current crimes, the defendant's prior convictions, and the particulars of his or her background, character, and prospects." (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.)

Defendant essentially reiterates the same arguments raised in response to the trial court's denial of his section 17, subdivision (b) motion, and expressly incorporates those arguments into his arguments on this issue. The trial court addressed the section 1385 motion immediately following its decision on the section 17, subdivision (b) motion; we infer the trial court's reasons for denying the section 1385 motion from its discussion of the section 17, subdivision (b) motion because the discussion addressed the factors pertinent to the section 1385 motion.

Where, as here, " 'the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid*.) This case is far from extraordinary.

For the same reasons the trial court did not abuse its discretion under section 17, subdivision (b), we also conclude that the trial court did not abuse its discretion under section 1385. That the 1998 conviction was remote and the circumstances underlying that conviction were different from the criminal threats conviction here do not render the trial court's decision an abuse of discretion.

"In determining whether a prior conviction is remote, the trial court should not simply consult the Gregorian calendar with blinders on. To be sure, a prior conviction may be stricken if it is remote in time. In criminal law parlance, this is sometimes referred to as 'washing out.' [Citations.] The phrase is apt because it carries the connotation of a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways. Where, as here, the defendant has led a continuous life of crime after the prior, there has been no 'washing out' and there is simply nothing mitigating about a 20-year-old prior. Phrased otherwise, the defendant has not lead a 'legally blameless life' since the 19[98] prior." (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) The trial court noted defendant's "antisocial conduct" and reflected on his extensive criminal history and the fact that "he keeps coming back into the system." Accordingly, this is not a case "where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

V

Remand For Reconsideration Of The Five-Year Enhancement Is Warranted

Under the law that was in effect on the date of defendant's sentencing, a person convicted of a serious felony with a prior serious felony conviction was subject to a five-year enhancement. (Former § 667, subd. (a).) Thus, at the time defendant was sentenced, a trial court did not have discretion to strike the enhancement in the interests of justice. (Former § 1385, subd. (b).) Indeed, during sentencing, the trial court said: "As to the five-year prior, the Court has no discretion. It has to impose it. That's under 1385(a)."

On September 30, 2018, the Governor signed Senate Bill No. 1393, which amended sections 667 and 1385 to give the trial court the discretion to strike the serious felony enhancement in the interests of justice. (Stats. 2018, ch. 1013, § 2; §§ 1385, 667, subd. (a).) Defendant contends, and the People concede, that because his conviction is

not yet final, the amendment to sections 667 and 1385 applies retroactively and makes him eligible for remand for resentencing and potential imposition of a reduced sentence. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a nonfinal conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; see also *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) We agree and will remand for this purpose.

DISPOSITION

The matter is remanded to the trial court to consider exercising its discretion in striking the five-year enhancement. In all other respects, the judgment is affirmed.

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Krause, J.